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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 378

SUSIE MATY, ADMINISTRATRIX OF THE ESTATE OF GEORGE MATY, ALSO KNOWN AS GEORGE MATEY,

Petitioner,

vs.

GRASSELLI CHEMICAL COMPANY.

REPLY BRIEF FOR PETITIONER.

I. Preliminary Statement.

At the oral argument on February 3, 1937, before your Honorable Court, leave was granted to the petitioner to file a reply brief.

The leave was requested to afford petitioner's counsel an opportunity to point out and to correct certain inaccurate statements concerning the facts appearing in the Respondent's Brief (received very shortly before the argument) and to answer a number of contentions therein made.

In view of the announcement at the argument that the present review of the case will be confined to the ruling of the Circuit Court of Appeals upon the question of the statute of limitations and the propriety of the allowance of the

amendment to the complaint, this memorandum will be directed to matters bearing upon that question.

II. Inaccurate Statements in Respondent's Brief Respecting the Facts.

While it may not affect the question involved, it should be observed that the original action was not instituted in the United States District Court as stated in Respondent's Brief, page 1. The summons was issued (R. 787) and the complaint filed in the Supreme Court of New Jersey (R. 788). It was removed to the United States District Court on defendant's petition (R. 790-792).

At page 2 of Respondent's Brief it is said the motion for a directed verdict "was denied with reservations—the trial judge reserving the right to direct a verdict for the respondent upon further study of the record." Neither the statement of the trial judge quoted from Record 722 nor any of the other comments of the learned trial judge on the motion, support the implication that there was a formal reservation of the right to direct a verdict later. *After* the verdict and upon the argument of the rule to show cause, etc., counsel did enter into a stipulation at the Court's suggestion, that if the trial judge should decide that the verdict should be set aside, a directed verdict could be entered instead of ordering a new trial, so that the losing side might appeal (R. 756-757).

At page 3 of Respondent's Brief, it is said the ruling of the trial judge in vacating the judgment for the plaintiff, was predicated "primarily" upon the failure of the plaintiff to prove defendant's knowledge of probable injurious effects from the inhalation of soda ash dust, "and also" upon the doubtful proofs as to the proximate cause of lung condition and as to whether plaintiff was in fact exposed to soda ash dust while he worked in the Phosphate Department, citing

(R. 783 and 784). While there were many comments and expressions of views by the learned trial judge in the course of the argument regarding other factors, he stated expressly that he based his ruling upon the sole ground of the question of knowledge (R. 784).

At page 11 of Respondent's Brief, it is asserted: "Plaintiff terminated his employment in the Phosphate Department in October, 1933." At page 11, and elsewhere, the date October 23, 1933, is stated. Maty testified he worked at the Dorr plant (Phosphate Department) until the last of *November*, 1933 (R. 31, 41). Chuba said it was 1933, "Chicken Day, Thanksgiving" (R. 201-202).

At pages 97 and 98 of Respondent's Brief, as part of the argument on the question of the statute of limitations, it is asserted:

> "There is absolutely no proof in this case of any dust condition with respect to soda ash, phosphate of soda or metasilicate while the plaintiff was employed in the Phosphate Department" (Statements to same effect, page 100).

The attention of your Honorable Court is directed to the portions of the testimony of Maty and others on this point quoted in the *Appendix* to Petitioner's Brief, pages 35-52. The trial judge expressly instructed the jury that any verdict must be based upon a continuance of the defendant's negligence in the Phosphate Department (R. 743). At that portion of his charge to the jury the trial judge said:

> "In other words, the law is that you must have a continuing injury by the defendant company, and if you assume that the injury began at the silicate department, you have to find further that the injury continued at the phosphate plant" (R. 743).

The trial judge called the jury's attention to the fact that the testimony was conflicting as to the "exposure" of the

plaintiff to the soda ash dust in the Phosphate Department (R. 743); and the jury by their verdict resolved that question in the plaintiff's favor.

That there was affirmative evidence of the plaintiff's exposure to the soda ash dust while he worked in the Phosphate Department, further appears from the recital of that fact in the hypothetical question framed by defendant's counsel (R. 531-532) as well as that framed by plaintiff's counsel (R. 272-274) respecting which the trial judge said "I think the testimony is accurately related" (R. 274).

The assertions, therefore, in Respondent's Brief that there was no exposure of the plaintiff to the soda ash dust in the phosphate department, are not justified. Upon the conflicting evidence, the jury found the fact the other way.

Respondent's Brief contains many other statements regarding the facts of the case, which are not supported by the record. Since, however, they have to do with the questions other than the statute of limitations and the amendment, the correction of them in the present Reply Brief appears unnecessary.

III. Comment Upon the Contentions Made in Respondent's Brief, and Authorities Therein Cited.

At page 6 of Respondent's Brief, the contention is made that "Paragraphs 1, 2 and 4 of the complaint contain the pertinent parts thereof in so far as the present review is concerned (R. 788)." We believe that paragraph 5 of the complaint, in which the negligence of the defendant is charged, is equally pertinent; and that paragraphs 6 and 7 (R. 789) cannot be ignored.

Paragraph 1 of the complaint pleads the whole term of plaintiff's employment to November, 1933, at the defendant's *plant*. The corresponding paragraph 1 of the answer admits that averment, except as to the immaterial qualification respecting the *month of November* (R. 793). Para-

graph 2 of the complaint is the only one in which the Silicate Department is mentioned by name, and respecting that department, paragraph 2 of the answer denied that plaintiff was there employed after *November 1, 1932.*

Since the plaintiff's proofs showed his continuous exposure to the deleterious substances in both departments down to about the end of November (Thanksgiving Day), 1933, it is clear that the suit brought October 1, 1935 (R. 787-788), was within two years, and if the Silicate Department had not been mentioned at all, no question of the statute of limitation could arise in the case. We contend the legal situation must be the same when the naming of the department or departments in which the plaintiff worked was an immaterial or non-essential detail. The amendment which was allowed to include specific reference to the Phosphate Department amounted merely to the addition of further detail.

Most of the cases cited in Respondent's Brief are so patently distinguishable that little comment is necessary.

In *Casavalo* v. *D'Auria,* 12 N. J. Misc. 81; affirmed 113 N. J. L. 328, cited on page 22, the amendment sought to add an entirely new charge of negligence, namely, the breach of a contractual or assumed duty to make repairs. In the present case, there was no change whatever in the legal duty originally set up or in the negligence charged.

In *N. & G. Taylor Co., Inc.,* v. *Anderson,* 275 U. S. 431, cited by respondent at page 25 of his brief, this Court ruled that a new cause of action was brought in by the amendment in question after the expiration of the statutory period, because the original declaration alleged an agreement between the respondent and the petitioner, while the amendment sought to set up a contract between the respondent and a certain partnership whose assets the petitioner claimed to have acquired. It was held that the change was not merely one of form because the fundamental substance of the claim

was different and therefore constituted a new cause of action.

In *Buntin* v. *Chicago, R. I. & P. Ry. Co.*, 41 Fed. 744, cited at page 27, the amendment attempted nine years after the original complaint sought to base the claim upon an allegation of negligence in the construction of a bridge whereas the overflow of plaintiff's land was originally attributed to the construction of an embankment. This was held to be a substitution of an entirely new ground of recovery. A similar attempt to substitute an entirely new and different ground of recovery was involved in the case of *Birkes* v. *United Fruit Co.*, 48 F. (2d) 657, mentioned by respondent at pages 28-29.

In *Chennault* v. *Stovale*, 160 So. 146, which respondent mistakenly suggests as on all fours with the instant case, the original petition showed on its face an alleged cause of action barred by the statute, and hence failed to state any cause of action whatever. In *Salyers* v. *U. S.*, 257 Fed. 255, the amendment sought after the statutory period to add a new and wholly different cause of action.

Most of the other cases cited by respondent are instances of the attempt to introduce by an amendment a totally different legal theory or ground of complaint or the addition of a separate and distinct tort.

The case of *Calhoun* v. *Washington Veneer Co.*, 15 Pac. (2d) 943, which respondent describes as very similar to the instant case on its facts, is plainly distinguishable. There the *only* negligence related to the first room in which the plaintiff worked and his action was not commenced within the statutory period from the end of his employment in that room. Insofar as his claim was concerned, there being no negligence with respect to the second room in which he worked, the situation was precisely the same as if he had not then been working for his employer at all. In the present case, under the evidence and the charge, the verdict

of the jury must be taken to have established Maty's continued exposure to the soda ash dust in the phosphate department and the continuance of his employer's negligence *qua* that department down to November, 1933, which culminated in Maty's disability and gave rise to his cause of action at that time.

None of the cases cited in Respondent's Brief affect the authority of the decisions relied upon in the brief for the petitioner and the principles therein announced. The amendment here made no change respecting the whole period of plaintiff's employment originally pleaded, the material statement of the conditions to which he was exposed, and the averment of defendant's negligence in respect thereto. The amendment merely expanded or amplified what was alleged in support of the cause of action already asserted.

The references in Respondent's Brief to comments of the learned trial judge in connection with the amendment need not be discussed in detail. Notwithstanding first impressions, the trial judge did allow the amendment. So far the views of the trial judge may be considered helpful, his final conclusion would be more important than his first impressions. At page 767 of the record, Judge Clark said:

> "The Court: I don't think there is anything to the statute of limitations, Mr. Rudner."

Respectfully submitted,

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